the claim of a party not before the court. Accordingly, if the court is itself divided,[16] or if it believes that there is reasonable ground for considering the question not settled by previous authorities,[17] or if there are dicta of weight indicating that another court of competent jurisdiction might reach a different conclusion,[18] the title cannot be called marketable.

The doctrine of marketable title is essentially an equitable one. In the absence of express stipulation a vendor was under an implied obligation at law to furnish only a "good" title,[19] which originally meant a title not bad in fact though it might be doubtful.[20] But in England the courts of law have adopted the equitable doctrine, certainly where the title is doubtful in fact,[21] and probably where it is doubtful as a matter of law.[22] In this country a tendency in the same direction appears in one or two jurisdictions which have separate systems of law and equity.[23] And in those where the two systems are combined, the equitable doctrine has been expressly carried over into actions at law.[24] The effect of this extension is illustrated by a recent decision in favor of the plaintiff, where the plaintiff sued at law to recover an installment and the defendant asked specific performance. *Dixon* v. *Cozine*, 114 N. Y. Supp. 685. Decisions of this kind are rapidly obliterating the distinction at law between title "good" and title "marketable," even when only the former is expressly contracted for.[25]

INDEMNIFICATION OF BAIL IN CRIMINAL CASES. — The defendant in a criminal case and his bail bear to each other the relation of principal and surety. A surety on a civil bond has, against his principal and co-sureties, the rights to indemnity,[1] contribution,[2] and, doubtless, subrogation,[3] of sureties generally. Early cases make little distinction between civil and criminal sureties; their positions in these respects were probably once identical.[4] Their obligations, however, are distinct: a civil surety undertakes that the principal shall perform his obligation;[5] a criminal surety guarantees the appearance of his principal for prosecution.[6] And on the ground that the chances of the prisoner's escape will be increased if his non-appearance involves no pecuniary loss to his bail, later courts have opposed the

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16 Abbott *v.* James, *supra.*
17 Cornell *v.* Andrews, *supra*, p. 18.
18 Lippincott *v.* Wikoff, 54 N. J. Eq. 107, 120.
19 Souter *v.* Drake, 5 B. & Ad. 992, 1002.
20 Boyman *v.* Gutch, 7 Bing. 379, 392. See Meyer *v.* Madreperla, 68 N. J. L. 258, 268.
21 Simmons *v.* Heseltine, 5 C. B. N. S. 554, 571.
22 Jeakes *v.* White, 6 Exch. 873, 881. *Contra*, Boyman *v.* Gutch, *supra.* See Simmons *v.* Heseltine, *supra.*
23 See Colwell *v.* Hamilton, 10 Watts, 413, 416; Swayne *v.* Lyon, 67 Pa. 436, 442; Harrass *v.* Edwards, 94 Wis. 459, 464; Hollifield *v.* Landrum, 31 Tex. Civ. App. 187. *Contra*, Meyer *v.* Madreperla, *supra.*
24 Moore *v.* Williams, 115 N. Y. 586, 597; Ladd *v.* Weiskopf, 62 Minn. 29.
25 See Herman *v.* Somers, 158 Pa. 424, 428; Reynolds *v.* Borel, 86 Cal. 538.

1 Fisher *v.* Fallows, 5 Esp. 171.
2 Belldon *v.* Tankard, 1 Marsh 6.
3 *Cf.* King *v.* Bennett, Wightw. 1.
4 Comyn, Dig., Bail, Q. 1; Petersdorff, Bail, 423.
5 Stevens *v.* Bigelow, 12 Mass. 433.
6 Cripps *v.* Hartnoll, 4 B. & S. 414.

creation of implicit, and the enforcement of explicit, obligations for the protection of a criminal bail.

It is well established that the surety by paying the bail bond obligation is not subrogated to the state's action against the accused.[7] In England there is an implied obligation upon the principal to indemnify his surety for all costs reasonably incident to the relation, but not for damages sustained through his failure to appear.[8] In a few American jurisdictions there may still be implied a general obligation to indemnify,[9] but the prevailing view is the other way.[10] And the courts of England, as also most American courts, refuse to enforce an express contract of indemnity made by the principal.[11] Where the law, by way of deliberate exception to general principles, declines to give a remedy, clearly it should recognize no attempt by the parties to create one.

In England contracts of indemnity by third parties are deemed as objectionable as express obligations of the principal.[12] In this country they are enforced.[13] The argument given for the American distinction is that, if the obligation runs from a stranger, the state has still two independent sources of satisfaction.[14] But so it has where the indemnification is to be by the principal; for the two promises remain to the state irrespective of any agreement between the principal and surety. It would seem as if there were a confusion of executory contracts to indemnify, with completed conveyances to facilitate qualification as bail[15] — transactions on general grounds open to attack.[16] In a recent decision a third party's promise to indemnify a criminal bail is upheld on principles broad enough to support all express obligations of that sort. *Carr* v. *Davis*, 63 S. E. 326 (W. Va.). It should be borne in mind, however, that the assurance to the state of the prisoner's appearance is the ultimate consideration of public policy in the institution of criminal bail. And this fact justifies a distinction between obligations to indemnify which run from the accused, and promises by third parties. That a bail indemnified by a stranger is under no greater incentive to prevent escape than one protected by the prisoner, is conceded. But the pressure upon an indemnifying third party is as strong as that upon any ordinary, unindemnified surety. And on a principle of substitution well recognized in this and kindred branches of the law, such an indemnifying third party seems entitled to all the necessary rights over the prisoner which the bail obtains from the state.[17] Of course, where the third party is in turn to be indemnified by the prisoner, the situation is in effect that created by an express promise by the principal to his surety; each obligation should, accordingly, be declared unenforceable by parties cognizant of the general scheme.[18] But

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[7] United States *v.* Ryder, 110 U. S. 729.
[8] Jones *v.* Orchard, 16 C. B. 614.
[9] Reynolds *v.* Harral, 2 Strob. (S. C.) 87.
[10] See Anderson *v.* Spence, 72 Ind. 315.
[11] Herman *v.* Jeuchner, 15 Q. B. D. 561; Ratcliffe *v.* Smith, 13 Bush (Ky.) 172. *Contra*, Simpson *v.* Robert, 35 Ga 180.
[12] Consolidated Exploration, etc., Co. *v.* Musgrave, [1900] 1 Ch. 37.
[13] Bird *v.* Washburn, 27 Mass. 223.
[14] United States *v.* Greene, 163 Fed. 442.
[15] *Cf.* Langlois *v.* Baby, 11 Grant Ch. (U. C.) 21.
[16] Nicholls's Bail, 1 Hodges 77.
[17] See 11 HARV. L. REV. 541. The extraordinary powers of bail over his principal are perhaps best explained on a theory of subrogation to the state's rights. See United States *v.* Ryder, *supra*. On the general question of subrogation to public rights, see Myers *v.* Miller, 45 W. Va. 595. And *cf.* Parsons *v.* Briddock, 2 Vern. 608.
[18] *Cf.* Capon *v.* Dillamore, 1 Bing. 423.

it is submitted that, apart from special facts, effect may properly be given to a transaction which, without materially impairing the state's assurance for the prisoner's appearance, lightens the burden of the criminal bail.[19]

RECENT CASES.

AGENCY — PRINCIPAL'S LIABILITY TO THIRD PERSONS IN TORT — LIABILITY OF MEMBERSHIP CORPORATION FOR FRAUDULENT ISSUES OF STOCK CERTIFICATES. — The defendant was a membership corporation empowered to issue certificates of indebtedness in the form of stock certificates and whose shares were transferable only on the books of the company upon surrender of the certificate representing them. The treasurer of the company fraudulently issued to himself spurious certificates, constituting an over-issue and with no corresponding shares on the books. The plaintiff loaned money on these spurious certificates and sued the defendant for the damages occasioned thereby. *Held*, that the defendant is not liable. *American, etc., Bank* v. *Woodlawn Cemetery*, 87 N. E. 107 (N. Y., Ct. App.). See NOTES, p. 526.

AGENCY — UNDISCLOSED PRINCIPAL — ELECTION TO SUE EITHER AGENT OR PRINCIPAL. — The plaintiff contracted with the agent of an undisclosed principal. After disclosure he sued the principal to judgment; but not obtaining satisfaction, he then sued the agent. *Held*, that suing the principal to judgment constitutes a conclusive election which discharges the agent. *Murphy* v. *Hutchinson*, 48 So. 178 (Miss.).

One who contracts with the agent of an undisclosed principal may sue either the agent or the principal. *Paterson* v. *Gandasequi*, 15 East 62. Nothing short of suing to judgment seems to constitute an election. *Cobb* v. *Knapp*, 71 N. Y. 348. See *Curtis* v. *Williamson*, L. R. 10 Q. B. 57. And it has even been held that satisfaction of a judgment against one is necessary to discharge the other. *Beymer* v. *Bonsall*, 79 Pa. St. 298. *Contra, Priestly* v. *Fernie*, 3 H. & C. 977. It has been suggested that there is no doctrine of election, but that the cause of action becomes merged in judgment secured against either. See 14 HARV. L. REV. 68. *Cf. Jansen* v. *Grimshaw*, 125 Ill. 468. But if the principal remains undisclosed when judgment is entered against the agent, the principal is not discharged. *Greenburg* v. *Palmieri*, 71 N. J. L. 83; *Remmel* v. *Townsend*, 31 N. Y. Supp. 985. This result, though inconsistent with the theory of merger, is desirable; for the same considerations of fairness that gave rise to this right to elect sustain its continuance until it has been consciously exercised, or satisfaction received. The doctrine of election thus seems to be the more satisfactory doctrine. The rule that only a judgment secured with knowledge of all the facts constitutes an election is often applied in analogous cases where one has an election of remedies. See *Moore* v. *Sanford*, 151 Mass. 285; *Garrett* v. *Farewell*, 199 Ill. 436.

ALIENS — NECESSITY OF RESIDENCE FOR NATURALIZATION BY MARRIAGE. — A resident alien sought naturalization papers. At the time of his application, his wife, who had never been a resident in this country, was detained by the immigration authorities because of a contagious disease. The petition for naturalization was opposed on the ground that by virtue of the act providing that "Any woman who is now, or may hereafter be married to a citizen of the United States, and who might herself be lawfully naturalized, shall be deemed a citizen" (U. S. Comp. St. (1901), p. 1268, § 1994), the naturalization of the husband would secure the admission of his wife. *Held*, that as the act of Congress is not to be construed as applying to non-resident aliens, the natu-

[19] *Cf.* Belond *v.* Guy, 20 Wash. 160.